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## CARDIAC CLAIMS UNDER CALIFORNIA'S WORKMEN'S COMPENSATION LAW

The most recent statistics published by the American Heart Association,<sup>1</sup> although somewhat encouraging, still highlight the magnitude of cardiovascular disease as a national health problem. In 1967, the last year for which statistics are available, cardiovascular diseases accounted for more than 54 percent of deaths from all causes.<sup>2</sup> Moreover, it is estimated that more than 27 million Americans are living with some form of cardiovascular illness.<sup>3</sup> Mortality projections show that 88,400 persons in California alone will die in 1970 as a result of cardiovascular disease,<sup>4</sup> and it is currently estimated that 1,333,000 Californians over the age of 20 suffer from some form of heart disease.<sup>5</sup>

### Alleged Inadequacy of California Compensation Laws

These staggering statistics have generated anxiety among employers and insurance carriers over the potential impact of heart claims upon workmen's compensation. This is certainly true in California, where a general consensus exists among employers that the current workmen's compensation provisions are inadequate to fairly determine whether a particular heart attack is or is not industrially connected.<sup>6</sup> Industry spokesmen assert that if present statutory provisions continue to be applied in determining compensability, a great majority of those Californians between 25 and 65 years of age who suffer from some type of heart disease are potential recipients of workmen's compensation benefits.<sup>7</sup> Even the California Heart Association has expressed the belief that under present criteria, "the number of heart attacks and other cardiovascular problems which could be judged industrial

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1. AMERICAN HEART ASS'N, HEART FACTS (PR-33, 1970).

2. *Id.* at 2.

3. *Id.*

4. *Id.* at 4.

5. *Id.* at 5.

6. See, e.g., Letter from Edmund D. Leonard, General Counsel for California Self-Insurers Association, to George Zenovich, Chairman of the Assembly Interim Committee on Finance and Insurance, Jan. 27, 1966; Letter from Christina J. New, Deputy City Attorney of Los Angeles, to the Assembly Interim Committee on Finance and Insurance, Jan. 26, 1966; Letter from Jack D. Wickware, Assistant Counsel for the League of California Cities, to the California Workmen's Compensation Study Commission, Nov. 30, 1964.

7. CALIFORNIA WORKMEN'S COMPENSATION STUDY COMM'N, INTERIM REPORT ON WORKMEN'S COMPENSATION 3 (1966) [hereinafter cited as COMMISSION REPORT].

would . . . be tremendous."<sup>8</sup>

Under California Labor Code section 3600, the primary conditions of compensability are met where "at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment,"<sup>9</sup> and where "the injury is proximately caused by the employment, either with or without negligence."<sup>10</sup> The term "injury" includes "any injury or disease arising out of the employment . . . ."<sup>11</sup> Under this definition, heart disease has long been recognized as a compensable injury.<sup>12</sup>

It is contended that such standards render it virtually impossible for an employer to disprove work connection,<sup>13</sup> and as a result, many cardiac episodes that are merely the culmination of preexisting heart disease are receiving compensation. Moreover, employers allege that difficulty in disproving work connection has forced them to settle a substantial number of heart claims by compromise and release agreements.<sup>14</sup> For fiscal year 1968, for instance, almost 54 percent of cardiac claims before the Workmen's Compensation Appeals Board<sup>15</sup> were compromised.<sup>16</sup>

A large part of the dissatisfaction of employers and insurance carriers with the present standards can be attributed to financial considerations. A significant rise in the number of heart claim awards will naturally result in increased premium rates. For those employers who elect to self-insure,<sup>17</sup> the financial consequences of having to bear the

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8. CALIFORNIA HEART ASS'N, HEART DISEASE AND WORKMEN'S COMPENSATION 7 (1964) [hereinafter cited as HEART DISEASE].

9. CAL. LABOR CODE § 3600(b).

10. *Id.* § 3600(c).

11. *Id.* § 3208.

12. *See, e.g.,* G.L. Eastman Co. v. Industrial Acc. Comm'n, 186 Cal. 587, 200 P. 17 (1921).

13. *See* COMMISSION REPORT, *supra* note 7, at 3.

14. *Id.*

15. CAL. LABOR CODE § 53, operative Jan. 15, 1966, eliminated the Industrial Accident Commission. The Commission's functions were transferred, for the most part, to the newly created Workmen's Compensation Appeals Board. Thus, prior to January 15, 1966, the cases will refer to the "Commission." Post January 15, 1966, cases refer to either the "Board" or "Appeals Board."

16. DIVISION OF LABOR STATISTICS AND RESEARCH, CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, ORIGINAL DECISIONS ISSUED AND BENEFITS AWARDED IN HEART DISEASE CASES BEFORE THE WORKMEN'S COMPENSATION APPEALS BOARD, FISCAL YEARS 1963-68 [hereinafter cited as LABOR STATISTICS].

17. Under CAL. LABOR CODE § 3700, every employer, except the state and political subdivisions or institutions thereof, must secure the payment of compensation through insurers authorized to write compensation insurance in California; or an employer may obtain a certificate of consent to self-insure, which may be issued upon proof of ability to self-insure and to pay any compensation that may become due. Employers who do not self-insure, and who do not wish to insure with an authorized

full costs of numerous awards could be disastrous.

Apart from self-insurance, the compensation insurance system in California operates, for the most part, in the following manner. The insurance commissioner is charged with the responsibility of classifying risks and establishing the statewide premium rates for workmen's compensation insurance.<sup>18</sup> The classification of risks is based mainly upon, although not limited to, the degree of hazard involved in the various occupations, businesses, and industries. The premium rates established correspond to the various risk classifications, and are usually expressed in amounts per \$100 of the payroll for a particular classification.<sup>19</sup> These rates are normally revised annually on the basis of data compiled from the two preceding policy years. If such statistics disclose an increase or decrease in the ratio of work-injury payments to premiums, the rates will be revised accordingly.<sup>20</sup>

Inasmuch as premium rates are adjusted according to the statewide "experience" in a particular classification, an increase in heart awards may not significantly raise the premium rate for any individual employer. Moreover, the employer who keeps work-injury losses to a level below that of the statewide average may be able to reduce his insurance costs under the "merit rating" provision of the California Insurance Code.<sup>21</sup> This provision allows the insurance commissioner to approve a system of merit rating in which the compensation experience of a particular insured is used as a factor in raising or lowering his premium rates, thereby encouraging an employer to keep his injury losses to a minimum.

### Fundamental Causation Issue

Financial considerations, while of prime importance to employers, are nevertheless merely symptomatic in relation to the underlying problem. Basically, the discontent of employers and insurance carriers with the present standards, as applied to heart claims, involves the fundamental issue of causation. It is felt that as a consequence of judicial interpretation, the employee's burden of establishing proximate cause<sup>22</sup> has become progressively lighter, and has now reached a point where em-

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private insurance carrier, may obtain insurance from the California Compensation Insurance Fund. CAL. INS. CODE § 11775. This fund provides California employers with the opportunity to obtain compensation insurance at cost.

18. CAL. INS. CODE § 11732.

19. Riesenfeld, *Efficacy and Costs of Workmen's Compensation*, 49 CALIF. L. REV. 631, 646 (1961).

20. 1 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 2.06(8) (2d ed. 1968) [hereinafter cited as HANNA].

21. CAL. INS. CODE § 11732.

22. Liberty Mut. Ins. Co. v. Industrial Acc. Comm'n, 73 Cal. App. 2d 555, 559, 166 P.2d 908, 911 (1946) (employee has the burden of establishing proximate cause).

ployment causation is established if the employee simply happened to be at work when the heart attack occurred.<sup>23</sup> To illustrate this progression, in *Truck Insurance Exchange v. Industrial Accident Commission*,<sup>24</sup> the court stated that in considering whether an injury arose out of and was proximately caused by the employment, common law rules of proximate cause, decisive in tort cases, are not applicable to questions of workmen's compensation, and that "reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee."<sup>25</sup> Then, in *Colonial Insurance Co. v. Industrial Accident Commission*,<sup>26</sup> the court held that the causal connection between the employment and the injury need only be a contributory cause.<sup>27</sup> This principle is reflected by the numerous decisions allowing recovery where the employment only accelerated or aggravated a preexisting heart condition.<sup>28</sup> Indeed, one authority has concluded that the judiciary has rendered the proximate cause requirement a dead letter in California's workmen's compensation law, and that it is now legally sufficient if there is merely coincidence between the employment and the injury.<sup>29</sup>

The medical aspect of causation has also contributed to employer dissatisfaction with the present standards of compensating heart claims. Medical testimony is, of course, necessary to establish a causal connection between the employment and the heart condition, for "where the subject matter is within the exclusive knowledge of experts trained in a scientific subject, expert evidence is essential."<sup>30</sup>

A major problem, however, is the general inadequacy of present medical knowledge concerning the causative factors of heart disability and death.<sup>31</sup> Consequently, conflicting medical testimony is frequently encountered by the Workmen's Compensation Appeals Board in heart cases. Some medical experts will testify that physical strain has no harmful effect upon a preexisting heart condition. Other physicians, equally qualified, will express the opposite view.<sup>32</sup> As might be ex-

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23. See CAL. LABOR CODE §§ 3212, 3212.2, 3212.5-7, regarding the statutory presumption of employment causation applied to heart claims of policemen, firemen and various other state civil service officers and employees.

24. 27 Cal. 2d 813, 167 P.2d 705 (1946).

25. *Id.* at 816, 167 P.2d at 706.

26. 29 Cal. 2d 79, 172 P.2d 884 (1946).

27. *Id.* at 83, 172 P.2d at 887.

28. See, e.g., *Reynolds Elec. & Eng'r Co. v. Workmen's Comp. App. Bd.*, 65 Cal. 2d 438, 421 P.2d 102, 55 Cal. Rptr. 254 (1966); *Southern Cal. Edison Co. v. Industrial Acc. Comm'n*, 235 Cal. App. 2d 567, 48 Cal. Rptr. 46 (1965).

29. 2 HANNA § 8.03(5)(b).

30. *City & County of San Francisco v. Industrial Acc. Comm'n*, 117 Cal. App. 2d 455, 459, 256 P.2d 81, 83 (1953).

31. See HEART DISEASE, *supra* note 8, at 4.

32. See *Liberty Mut. Ins. Co. v. Industrial Acc. Comm'n*, 73 Cal. App. 2d 555, 560, 166 P.2d 908, 911 (1946).

pected, this has resulted in the rendering of what would appear to be opposite findings by the referee upon almost identical facts and opinions, depending upon what medical view is persuasive in a given case.<sup>33</sup>

Thus, employers complain that in many cases a claimant merely has to locate a doctor, often the claimant's family physician, who will testify to the effect that the cardiac disability was industrially caused, in order to overcome the testimony of other physicians and independent medical examiners that the injury was nonindustrial.<sup>34</sup> Moreover, it is alleged that the frequent conflict in medical testimony is almost invariably resolved in favor of the claimant because of Labor Code section 3202, which provides that the law of workmen's compensation "shall be liberally construed by the courts with the purpose of extending [its] benefits for the protection of persons injured in the course of employment."

Since proximate cause is a question of fact to be resolved by the Workmen's Compensation Appeals Board,<sup>35</sup> the anxiety of employers over cardiac claims is further exacerbated by Labor Code section 5953, which states that "the findings and conclusions of the [board] on questions of fact are conclusive and final and not subject to review." Thus, if an employer loses a case at the board level, he feels that there is little to be gained in seeking a writ of review.

From the employer's standpoint, it appears that legally, it is sufficient if the employment is merely a cause in fact of the injury. Compensation, then, seems to turn upon the medical testimony alone, which in the words of the California Heart Association, often supports awards "based more on folklore than scientific facts."<sup>36</sup>

### Demand for Minimum Legal or Medical Criteria

To avoid compensating cardiac incidents that result solely from the natural progression of a preexisting heart disease, it is commonly proposed that some test be established to guide the board and the courts in determining the compensability of heart claims.<sup>37</sup> The majority of proposed tests advocate the adoption of either minimum legal or medical criteria, which must be met before compensation is awarded. The desirability of adopting some minimum standard has not been averred by employers and insurance carriers alone. From time to time the judiciary has also echoed such sentiments.<sup>38</sup>

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33. *Id.*

34. COMMISSION REPORT, *supra* note 7, at 41.

35. *Liberty Mut. Ins. Co. v. Industrial Acc. Comm'n*, 73 Cal. App. 2d 555, 559, 166 P.2d 908, 911 (1946).

36. HEART DISEASE, *supra* note 8, at 8.

37. See notes 39, 48, 49, 58, 63 & accompanying text *infra*.

38. See, e.g., *Daniels v. Industrial Acc. Comm'n*, 148 Cal. App. 2d 500, 503-04,

## Proposed Legal Tests

### "Unusual Strain"

One proposed test for legal causation, that of "unusual strain," has received new support.<sup>39</sup> To come within this test, a claimant would have to prove that his cardiac episode occurred as the result of some physical exertion or mental strain that was greater than the exertion or strain demanded in the performance of his normal duties. Only by demonstrating this unusual strain could an employee overcome the inference that his heart attack was due to natural causes. Should the claimant satisfy this legal test of causation, to receive compensation he would still have to show that, medically, the unusual strain adversely affected his heart.

Originally, the "unusual strain" test was employed in a different capacity, namely, to determine whether or not an injury was "accidental" in those jurisdictions whose workmen's compensation laws only apply to "accidental injuries."<sup>40</sup> A claimant who incurred a heart attack had to show that the precipitating exertion was unusual in comparison to the exertion normally required by his regular duties. A cardiac episode was not considered an accidental injury unless such a showing of unusual exertion was made.

Although the vast majority of jurisdictions still require an injury to be accidental in nature to come within workmen's compensation,<sup>41</sup> only a few states, when considering heart claims, continue to define "accidental" in terms of unusual exertion.<sup>42</sup> In general, the remaining jurisdictions now consider that exertion usual to one's employment as sufficient to satisfy their "accident" requirement.<sup>43</sup> California eliminated the "accident" provision from its workmen's compensation law in 1915,<sup>44</sup> two years after the Workmen's Compensation Act was passed.<sup>45</sup> Thus, California avoided the difficulties plaguing those jurisdictions required to find the accidental nature of a cardiac incident that was not

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306 P.2d 905, 907 (1957).

39. See, e.g., 26 CIRCULATION 619, 620 (1962); COMMISSION REPORT, *supra* note 7, at 46.

40. 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 37.10 (1952) [hereinafter cited as LARSON]. Only six states are listed that do *not* require a compensable injury to be accidental in nature. They are: California, Iowa, Massachusetts, Minnesota, Rhode Island and Texas.

41. See note 40 *supra*.

42. 1A LARSON § 38.30, at 551-59, listing Colorado, Delaware, Florida, Indiana, Missouri, Nebraska, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota and Washington.

43. 1A LARSON § 38.30, at 541-51.

44. Cal. Stats. 1915, ch. 607, § 2, at 1081.

45. Cal. Stats. 1913, ch. 176, at 279.

caused by direct trauma to the heart or chest.<sup>46</sup>

Many criticisms of the "unusual strain" test as used to show an "accidental" injury also apply to its utilization as a separate legal test of causation. One major drawback is that it operates arbitrarily and unfairly in that the comparison is with the exertion required by the normal duties of an employee. Thus, should a household mover suffer a heart attack while loading a piano, he would probably be denied compensation because of the absence of "unusual" exertion. On the other hand, suppose an office worker, whose regular duties involve little physical exertion, incurs a heart attack while lifting a typewriter. His chances of receiving compensation are excellent because he can show "unusual" exertion.

### *"Wear and Tear of Life"*

Suggested improvements upon the "unusual strain" test have dealt mainly with the formulation of a single consistent norm of exertion for all employees with which the precipitating exertion of a cardiac episode can be compared. For instance, in a 1957 New York case, *Burris v. Lewis*,<sup>47</sup> the court of appeals adopted what is commonly termed the "wear and tear of life" test. The court, in clarifying an earlier decision, which apparently eliminated any requirement of unusual exertion, stated that the case nevertheless required "that the regular job activity shall entail greater exertion than the ordinary wear and tear of life . . . ."<sup>48</sup> Under this rule, the showing of unusual strain is not determined by reference to the exertion involved in a claimant's regular duties, but by comparison to the strain of the ordinary nonemployment life of all persons. In other words, for the legal test of causation to be satisfied, the strain must be greater than that encountered by everyone in normal day-to-day living. If the medical testimony also supports a causal connection between the employment exertion and the cardiac incident, compensation is awarded. Thus, the "wear and tear of life" test, unlike the "unusual strain" test, has the obvious advantage of providing a single norm that does not vary with the physical or mental demands of a particular job.

### *"Actual Risk"*

A somewhat similar proposal, the "actual risk" test, has also been suggested as a rational standard of legal causation.<sup>49</sup> In determining

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46. See Wood, *The Heart Attack Case in Workmen's Compensation*, 16 ARK. L. REV. 214, 215-19 (1962).

47. 2 N.Y.2d 323, 141 N.E.2d 424, 160 N.Y.S.2d 853 (1957).

48. *Id.* at 326, 141 N.E.2d at 426, 160 N.Y.S.2d at 855.

49. Larson, *The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solution*, 65 MICH. L. REV. 441, 470 (1967) [hereinafter cited as *Heart*



compensability, this test takes into account both the "personal risks" contributed by the employee, and the "employment risks" that the employee encounters in a particular job. As applied to heart cases, the "actual risk" test would operate as follows:

If there is some personal causal contribution *in the form of a previously weakened or diseased heart*, a heart attack would be compensable only if the employment contribution takes the form of an exertion greater than that of nonemployment life . . . . [I]f there is no personal causal contribution, that is, if there is no prior weakness or disease, *any* exertion connected with the employment and causally connected with the collapse as a matter of medical fact would be adequate to satisfy the *legal* test of causation.<sup>50</sup>

These suggested tests of legal causation, although certainly an improvement upon the "unusual strain" test, would still operate to exclude compensation for many work-connected cardiac injuries, if only because the tests are arbitrary in character. "Ordinary wear and tear of life" may be a better standard than "unusual strain," but what is the quantum of strain involved in the ordinary wear and tear of life? Can it be stated in a precise standard of universal, national, or at least state-wide validity? The board and the courts would probably have as much difficulty in determining what is ordinary wear and tear as other jurisdictions have had in determining what constitutes unusual strain.<sup>51</sup>

Again, even though the "actual risk" test is much more sophisticated than the "unusual strain" test, it still does not solve all the problems involved in heart cases. First of all, the problem remains of determining what is or is not exertion greater than that of nonemployment life.<sup>52</sup> Moreover, before the "actual risk" test can be applied, it must be known whether or not a claimant suffered from a preexisting heart condition. While in the majority of cases the medical records will show a prior history of heart trouble, in many cases they do not. In other words, a preexisting heart condition may be asymptomatic, thereby making it difficult, if not impossible, to determine whether there has been per-

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*Attack Cases*].

50. *Id.*

51. New York, which utilizes the "wear and tear" test, has avoided defining the norm of exertion constituting ordinary wear and tear of life. In each case it is found as a matter of fact, without explanation, that the exertion involved was or was not greater than the ordinary wear and tear of life. Thus, in its application, the "wear and tear" standard, like the "unusual strain" test, will vary from case to case. For example, the court may find that pitching leaves onto a truck requires exertion greater than the ordinary wear and tear of life. *Gibalski v. Elmira Country Club*, 8 App. Div. 2d 883, 187 N.Y.S.2d 159 (1959). On the other hand, the court may find that the overhead installation of electrical outlets and tubing while standing on a ladder requires no more exertion than that needed to meet the ordinary wear and tear of life. *O'Brien v. Ronneberg*, 8 App. Div. 2d 880, 186 N.Y.S.2d 725 (1959).

52. See text accompanying notes 50-51 *supra*.

sonal causal contribution.<sup>53</sup> In death cases, an autopsy would resolve this problem, but not, of course, in cases where the heart attack was only disabling.

### Proposed Medical Tests

The adoption of minimum medical criteria for determining the compensability of cardiac injuries has also been suggested.<sup>54</sup> The imposition of such criteria would operate to exclude compensation for heart attacks which, from a medical standpoint, were not industrially caused. To date, three states have taken this approach: Utah,<sup>55</sup> Washington,<sup>56</sup> and Oklahoma.<sup>57</sup>

The Utah plan establishes, for the various types of heart disease, maximum time limitations within which symptoms of cardiac injury must appear after the alleged precipitating exertion occurred.<sup>58</sup> For example, in considering coronary thrombosis with myocardial infarction<sup>59</sup>—the most frequent type of heart attack<sup>60</sup>—the Utah committee report states that

[i]t seems reasonable to us to assume a probable relation between the exertion and the coronary thrombosis with myocardial infarction if new symptoms . . . appear shortly after that exertion and especially if such symptoms appear within one or two hours after such exertion . . . . [W]here the first symptoms . . . appear later than 12 hours after the exertion, it is our opinion that a causal precipitating relation between the exertion and the coronary thrombosis with myocardial infarction would be improbable.<sup>61</sup>

Washington approached the subject in a similar manner, although generally its criteria are more stringent than those recommended by the Utah committee. To establish medical causality for coronary occlusion

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53. See *Heart Attack Cases*, *supra* note 49, at 472-73.

54. COMMISSION REPORT, *supra* note 7, at 46.

55. Utah Heart Ass'n, *Coronary Heart Disease and Utah Industrial Compensation*, in H. McNIECE, *HEART DISEASE AND THE LAW* 576-78 (1961) [hereinafter cited as *Utah Report*].

56. Committee on Trauma and Strain, Washington Heart Ass'n, *Guide for Establishing Causal Relationship Between Trauma or Strain and Heart Disease*, in Aronson, *Effect of Effort on the Diseased Heart*, 55 NORTHWEST MEDICINE 54 (Jan. 1956) [hereinafter cited as *Washington Report*].

57. Oklahoma Heart Ass'n, *Report of the Cardiac-in-Industry Committee* in H. McNIECE, *HEART DISEASE AND THE LAW* 46 (1961).

58. *Utah Report*, *supra* note 55, at 578.

59. This type of heart attack occurs when a portion of the heart muscle (myocardium) is deprived of its blood supply due to the formation of a blood clot (thrombus) in an arterial wall, thereby causing that part of the heart muscle to die (infarction). For an excellent article which discusses in laymen's terms the working of the heart and the nature of the common types of heart ailments, see Waugh, *Physiology of the Heart*, 11 CLEV.-MAR. L. REV. 233 (1962).

60. AMERICAN HEART ASS'N, *HEART FACTS* 2 (PR-33, 1970).

61. *Utah Report*, *supra* note 55, at 577-78.

with myocardial infarction,<sup>62</sup> the first symptoms or signs must appear "during or immediately following exertion or strain . . . ."<sup>63</sup>

Additionally, whereas the Utah committee took no stand on the "unusual strain" issue,<sup>64</sup> the Washington report stated flatly that for medical causality to exist, the exertion or strain must be "both excessive and unusual."<sup>65</sup> In other words, usual exertion should no longer be considered a cause of disabling coronary disease. For the most part, Washington's guidelines were adopted by Oklahoma.<sup>66</sup>

The prevalent criticisms of the utilization of minimum medical criteria include the contention that, given the current conflict in medical opinion surrounding the effect of exertion on the heart, any criterion established would merely represent a compromise between opposing views.<sup>67</sup> Furthermore, many opponents assert that as medical research progresses,<sup>68</sup> any standard adopted would shortly become outdated. Even medical certainty as to the causes of heart attacks may not eliminate all the problems in this area. For example, suppose a worker, who had enjoyed prior good health, suffered a heart attack immediately after lifting an extremely heavy object. "The powerful suggestion of cause and effect embodied in such a chain of events may hold too great an attraction for a compensation referee . . . to be overcome even by generally accepted medical principles which negate causation."<sup>69</sup> Finally, it would be highly unjust to deny compensation for a cardiac episode clearly caused by the employment simply because the attack occurred shortly after the recommended maximum time limit.

### Other Proposals

Authorization to use written waivers of compensation benefits before employing persons with suspected heart conditions has also been sought.<sup>70</sup> The waiver would relieve an employer from liability should the employee incur a heart attack in the performance of his work.

This suggestion is clearly repugnant to the basic purpose of work-

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62. A thrombus is a form of occlusion. See note 59 *supra*.

63. *Washington Report*, *supra* note 56, at 68.

64. *Utah Report*, *supra* note 55, at 578.

65. *Washington Report*, *supra* note 56, at 69.

66. The medical criteria discussed in the text accompanying notes 58-65 *supra* are utilized in an advisory capacity only. They are not the subject of statutes in either Utah, Washington or Oklahoma. However, inasmuch as their utilization is recommended by the Heart Association of each state, physicians called upon to testify in workmen's compensation proceedings commonly apply them.

67. H. McNIECE, *HEART DISEASE AND THE LAW* 118 (1961).

68. *Id.*

69. *Id.* at 312.

70. Letter from Christina J. New, Deputy City Attorney of Los Angeles, to the Assembly Interim Committee on Finance and Insurance 4-5, Jan. 26, 1966.

men's compensation, which is to compensate for all injuries arising out of and in the course of employment.<sup>71</sup> Even though an employee may have had prior heart trouble, should employment subsequent thereto aggravate his heart condition to the extent of disablement or death, he ought to be awarded appropriate compensation.<sup>72</sup> In an early case, the Washington Supreme Court stated that "it was not the legislative purpose to limit the provisions of the Workmen's Compensation Act to only such persons as approximate physical perfection."<sup>73</sup> Apparently, such was never the intent of the California legislature either, for waivers are specifically prohibited by the Labor Code.<sup>74</sup>

The extreme solution of completely eliminating heart cases from the scope of workmen's compensation has also been suggested,<sup>75</sup> and has even been adopted by at least one jurisdiction.<sup>76</sup> The following proposed addition to the Labor Code, which, in substance, would have the same effect, was recently introduced in the California Assembly:

Notwithstanding the provisions of Section 3208,<sup>77</sup> cardiac, cardiovascular, or circulatory disease shall not be held to be an injury or to be caused or aggravated by the employment; provided, however, that disability or death due to aggravation of cardiac, cardiovascular or circulatory disease may be held to be an injury if caused *solely and exclusively by an extraordinary or unusual incident . . .*<sup>78</sup>

Such a provision, if enacted,<sup>79</sup> would successfully eliminate cardiac claims from workmen's compensation inasmuch as the vast majority of heart attacks involve preexisting disease. This proposal is open to the same criticisms applicable to waivers.<sup>80</sup>

The imposition of arbitrary standards, whether legal, medical, or otherwise, not only tends to defeat rather than fulfill the purpose of workmen's compensation, but it diverts attention from the basic issue involved—did the employment, in fact, causally contribute to the injury. Although all arbitrary standards can be criticised on one ground or another, it is recognized that in many situations they are necessary to

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71. CAL. LABOR CODE § 3208.

72. See cases cited note 28 *supra*.

73. *Metcalf v. Department of Labor and Indus.*, 68 Wash. 305, 309, 11 P.2d 821, 823 (1932).

74. CAL. LABOR CODE § 5000.

75. Letter from Christina J. New, Deputy Attorney of Los Angeles, to the Assembly Interim Committee on Finance and Insurance 3, Jan. 26, 1966.

76. NEV. REV. STAT. § 616.110(2) (1967).

77. See text accompanying note 11 *supra*.

78. AB 1157 (1969) (emphasis added).

79. The bill was referred to the Assembly Committee on Finance and Insurance, but was never reported out.

80. See text accompanying notes 71-73 *supra*.

enable a given law to perform its designated function. The question is, therefore, does the present method of determining compensation of heart attacks in California require the adoption of an arbitrary standard in order to satisfactorily accomplish the purpose of the compensation laws?

### California's Approach

To reiterate, California does not require that an injury be accidental in character;<sup>81</sup> nor does California legally require unusual strain as a condition of compensability.<sup>82</sup> As Larson, the author of the "actual risk" test, points out, California differs from most jurisdictions in that compensability of heart claims has long been fought on the fundamental issue of causation alone.<sup>83</sup> Proximate cause is a question of fact,<sup>84</sup> as is the weight to be accorded medical testimony.<sup>85</sup> Whether the strain is usual or unusual is only one of the facts involved.<sup>86</sup> Thus, the trier of fact is *free from arbitrary absolutes* in determining compensability. This approach, contrary to the allegations of insurance carriers and employers, has not been manifestly unfair. A review of the statistics, cases, and code provisions concerning cardiac disability or death do not demonstrate the need to impose arbitrary standards.

### Statistics

Statistics show that heart claims comprise only a small percentage of the total number of claims under workmen's compensation. For the fiscal year ending June 30, 1964, heart claims accounted for only 2.8 percent of the total original decisions issued by the board.<sup>87</sup> For fiscal years 1965 through 1968, the respective percentages were 2.7, 2.9, 3.2 and 3.1.<sup>88</sup> The actual number of heart claims for each of those fiscal years is as follows: 1964 - 1,191; 1965 - 1,219; 1966 - 1,334; 1967 - 1,620; 1968 - 1,656.<sup>89</sup> These statistics certainly demonstrate that heart claims are not as great a burden upon workmen's compensation as employers allege. The slight increase from year to year is compatible with

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81. See text accompanying note 44 *supra*.

82. *Liberty Mut. Ins. Co. v. Industrial Acc. Comm'n*, 73 Cal. App. 2d 555, 563, 166 P.2d 908, 913 (1946).

83. *Heart Attack Cases*, *supra* note 49, at 473.

84. *Fontno v. Workmen's Comp. App. Bd.*, 273 A.C.A. 741, 747, 78 Cal. Rptr. 291, 295 (1969); *Liberty Mut. Ins. Co. v. Industrial Acc. Comm'n*, 73 Cal. App. 2d 555, 559, 166 P.2d 908, 911 (1946).

85. *Liberty Mut. Ins. Co. v. Industrial Acc. Comm'n*, 73 Cal. App. 2d 555, 560, 166 P.2d 908, 911 (1946).

86. *Id.* at 563, 166 P.2d at 913.

87. *LABOR STATISTICS*, *supra* note 16.

88. *Id.*

89. *Id.*

the annual increase in the California labor force<sup>90</sup> and the growing awareness by claimants of the developing law concerning heart injuries.<sup>91</sup>

### Decisional Trends

An excellent review of the reported decisions involving heart disorders, made by the legal staff of the State Compensation Insurance Fund,<sup>92</sup> illustrates numerous factual trends in California's approach to determining the compensability of heart claims. On the whole, these trends indicate that factually California has incorporated many of the suggested standards urged by employers.

#### "Unusualness" an Important Factor

Although unusual employment-connected stress or strain is not a mandatory requisite to secure compensation, its absence is a significant factor in denying compensation.<sup>93</sup> In *City and County of San Francisco v. Industrial Accident Commission*,<sup>94</sup> decedent incurred a heart attack while cutting and removing a tree that had fallen across a driveway during a heavy storm. The court annulled an award of death benefits, noting that

[i]t is true that the employee died immediately after performing a task that was the most arduous of any required by his employment. However, it is not a matter of common knowledge that operating a cross-cut saw with a partner on the other end is labor of such a strenuous type as to bring on a fatal heart attack.<sup>95</sup>

In *Huff v. Petrolite Corp.*,<sup>96</sup> the denial of death benefits was affirmed by the board. Prior to his fatal heart attack, decedent had worked during the day as a warehouseman for Petrolite, and at night as a box boy for a department store. The board stated that although decedent was quite busy on the night of the heart attack, there was no

90. For fiscal years 1965 through 1968, the total number of civilians employed in California increased at an annual rate of approximately 3.8 percent. CALIFORNIA DEP'T OF INDUSTRIAL RELATIONS, REPORT ON ESTIMATED CIVILIAN EMPLOYMENT, UNEMPLOYMENT AND LABOR FORCE IN CALIFORNIA, 1940-1968, at 1 (Jan. 1969). For those same fiscal years, the total number of claims before the board increased at an average annual rate of 5.6 percent. LABOR STATISTICS, *supra* note 16. The number of heart claims has also increased annually; but the ratio of heart claims to total workmen's compensation claims has remained constant at 3 percent. See text accompanying note 88 *supra*.

91. COMMISSION REPORT, *supra* note 7, at 45.

92. E. CORTEN & S. ST. CLAIR, REPORT ON CURRENT APPELLATE RULINGS CONCERNING WORKMEN'S COMPENSATION CLAIMS FOR DISABILITY OR DEATH ARISING OUT OF CARDIAC CONDITIONS (1965) [hereinafter cited as CORTEN & ST. CLAIR].

93. *Id.* at 10.

94. 117 Cal. App. 2d 455, 256 P.2d 81 (1953).

95. *Id.* at 458, 256 P.2d at 83.

96. 32 Cal. Comp. Cases 117 (1966).

evidence of unusual exertion. "His duties in the various employments required considerable physical activity but could not be considered unusually strenuous."<sup>97</sup>

Conversely, the presence of unusual strain is often the decisive factor in the awarding of compensation. In *Shelburne Refrigeration, Inc. v. Workmen's Compensation Appeals Board*,<sup>98</sup> decedent suffered a heart attack allegedly precipitated by two lifting incidents. Within the space of two days, decedent by himself replaced a compressor weighing about 150 pounds, a job that normally requires two men, and also helped a fellow employee lift a 200-250 pound air conditioner. While the autopsy report conceded that the employment possibly caused the fatal attack, the board felt that such strain was the probable cause thereof, and accordingly awarded death benefits.<sup>99</sup>

### *Usual Strain*

Of course, disability or death benefits have been awarded in cases where unusual stress or strain was absent. In all such instances, however, there was "invariably substantial medical evidence to connect the employment with the fatal or disabling heart disease."<sup>100</sup> This does not mean that the medical evidence is slighted where unusual strain is involved. What is meant, rather, is that from the viewpoint of the layman, a heart attack that occurred during or immediately after strenuous exertion in all probability must be causally related thereto. Conversely, employment causation is not readily apparent to the layman where only usual exertion is present. In the latter situation, the referee or board must of necessity rely heavily upon the medical evidence in determining whether or not a heart attack was employment-connected.

For example, in *City and County of San Francisco v. Industrial Accident Commission*,<sup>101</sup> an ambulance steward suffered a heart attack while unloading an oxygen tank in order to inspect it. He received disability benefits even though removing the tank was part of his regular duties. Particularly persuasive upon the commission was the testimony

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97. *Id.* at 119; *accord*, *Grace v. Industrial Acc. Comm'n*, 20 Cal. Comp. Cases 247 (1955), wherein the commission reversed the referee's award of benefits to a butler-chauffeur who allegedly suffered a disabling heart attack after lifting numerous pieces of furniture in order to remove pads of paper from underneath them. Apparently, the commission felt that little exertion was required to perform such work.

98. 31 Cal. Comp. Cases 125 (1966).

99. *Accord*, *Smith v. Workmen's Comp. App. Bd.*, 71 A.C. 609, 455 P.2d 822, 78 Cal. Rptr. 718 (1969), wherein the court reversed the board's denial of death benefits. The court pointed out that the employer's medical examiner did not take into consideration the strenuous nature of decedent's work (tree laborer) in reaching his conclusion that there was no evidence of industrial causation.

100. CORTEN & ST. CLAIR, *supra* note 92, at 13.

101. 29 Cal. Comp. Cases 229 (1964).

of an independent medical examiner, who concluded that "such exertion even for one or two minutes might have been sufficient to have induced some myocardial muscle necrosis . . . thereby initiating his beginning infarction."<sup>102</sup>

On the other hand, where the medical testimony does not substantially support work connection, and only usual exertion is involved, compensation is normally denied. In *Daniels v. Industrial Accident Commission*,<sup>103</sup> the appellate court affirmed the commission's denial of death benefits. The decedent was employed as a "trouble shooter" for an irrigation district. His regular duties occasionally involved the climbing of poles in order to repair transformers, meters, and other electrical facilities. On the day of his death, he suffered a heart attack while climbing a pole for the third time. Initially, the commission awarded death benefits upon medical testimony which, although conflicting, favored the conclusion that the heart attack was work-connected. However, upon the motion of the insurance carrier, the commission reconsidered the case, decedent's body was exhumed for a second autopsy, and further medical testimony was taken. The new evidence leaned in the opposite direction, and accordingly, the commission annulled the previous award.<sup>104</sup>

### *Symptomatic Versus Asymptomatic*

The presence or absence of symptoms prior to an alleged industrially related heart condition is also an important consideration.<sup>105</sup> Thus, compensation is often denied where it is established that the employee's heart condition was symptomatic prior to the alleged industrial

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102. *Id.* at 230; *accord*, *Engineers, Ltd. v. Industrial Acc. Comm'n*, 22 Cal. Comp. Cases 130 (1957), wherein disability benefits were awarded to a carpenter who suffered a heart attack when lifting a steel shore weighing approximately 70 pounds. His work normally involved such lifting; and it was conceded that the exertion on the day of the attack was not unusual. However, the preponderance of the medical evidence clearly established work connection.

103. 148 Cal. App. 2d 500, 306 P.2d 905 (1957).

104. *Accord*, *Foster v. Industrial Acc. Comm'n*, 136 Cal. App. 2d 812, 289 P.2d 253 (1955), wherein the denial of death benefits was also affirmed. Decedent, a mechanic, suffered a heart attack while performing ordinary office work, which the evidence indicated did not involve any emotional or physical strain. One physician, who had treated decedent on several occasions, testified that, nevertheless, the work and the circumstances under which it was performed causally contributed to the fatal attack. Another physician, who submitted a report based upon a review of the testimony, concluded that there was "no shred of evidence that [decedent's] job was in any way responsible for his death." *Id.* at 814, 289 P.2d at 254. Obviously, the absence of unusual strain helped persuade the commission to accept as decisive the "armchair" physician's report.

105. *CORTEN & ST. CLAIR*, *supra* note 92, at 20.



injury.<sup>106</sup> For example, in *Paget v. Industrial Accident Commission*,<sup>107</sup> death benefits were denied to the widow of a hydraulic engineer who suffered a fatal heart attack while driving a car in connection with his work. It was noted that approximately a year before his death, the decedent had complained of a dull pain in his chest. He was examined at that time, and the physician made a diagnosis of myocarditis and cardiac hypertrophy.<sup>108</sup>

Conversely, where the evidence clearly indicates that the claimant has had no prior symptoms of heart disease, his fatal or disabling attack is often held to be employment-related.<sup>109</sup> In *Pacific Motor Trucking Co. v. Industrial Accident Commission*,<sup>110</sup> the decedent, a truck driver, apparently had a heart attack while trying to avoid driving into two vehicles parked along the shoulder of the road. Death benefits were awarded to his widow in light of the family physician's testimony that decedent had no signs of heart disease, and statements from coemployees that decedent appeared to be in excellent health and had never complained of any heart trouble.

In *Casualty Insurance Co. v. Industrial Accident Commission*,<sup>111</sup> disability benefits were awarded to a linoleum salesman who suffered a heart attack while lifting a 12-foot roll of linoleum. "Reports of the doctors and the testimony of [claimant] himself indicated that . . . he had never suffered any pain or had any trouble doing the work prior to the [attack]."<sup>112</sup>

In summary, unusual physical or mental strain is one of the factors present in the majority of successful heart claims. Where only usual strain is involved, compensation will be denied unless there is substantial medical evidence showing causal connection between the employment and the injury. Moreover, where the heart condition is symptomatic, compensation is more likely to be denied.

Thus, the statistics, which demonstrate the relative insignificance of heart claims upon workmen's compensation awards, and the decisions, which reflect current application of compensation standards sought legislatively by employers and insurance carriers, do not indi-

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106. *Id.*

107. 20 Cal. Comp. Cases 262 (1955).

108. *Accord*, *Camp v. Industrial Acc. Comm'n*, 23 Cal. Comp. Cases 46 (1958), wherein death benefits were also denied. Decedent, a business agent and secretary-treasurer for a union, suffered a heart attack while under great physical and mental stress from negotiating labor contracts. The medical records indicated, however, that he had been in poor health, had weighed over 300 pounds, and had suffered from arteriosclerotic heart disease.

109. CORTEN & ST. CLAIR, *supra* note 92, at 20.

110. 27 Cal. Comp. Cases 128 (1962).

111. 23 Cal. Comp. Cases 185 (1958).

112. *Id.*

cate a need for the imposition of arbitrary legal or medical absolutes.

### Statutory Provisions

The numerous statutory provisions affording protection to employers from excessive or unjust liability also rebut the alleged need for arbitrary standards. For example, California Labor Code section 4663 provides that in cases of aggravation of any disease existing prior to a compensable injury, "compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury." In other words, the employer is relieved of liability for that portion of the disability attributable to the natural progression of preexisting disease.<sup>113</sup>

While it is true that this section does not provide for the similar apportionment of death benefits, the absence thereof has not been an unconscionable burden upon employers or insurance carriers. In fiscal year 1968, death benefits were awarded in only 49 cases out of the 1,656 cases before the board.<sup>114</sup> Moreover, an employer may request that the board order an autopsy in cases where there is reasonable doubt that an employee died as the result of injuries sustained in the course of employment.<sup>115</sup> If the dependents of the decedent refuse to allow an autopsy, a rebuttable presumption arises "that the injury or death was not due to causes entitling the claimants to benefits . . . ."<sup>116</sup>

Even where an employee obtains the right to disability compensation, the employer can require him to submit to periodic examinations by a qualified physician in order to determine the current status of such disability.<sup>117</sup> An employee's failure or refusal to submit to an examination, or his obstruction thereof, may suspend his right to commence or continue any action for the payment of compensation.<sup>118</sup>

The employer also has the right to effect a compromise and release agreement,<sup>119</sup> which, of course, must be approved by the board.<sup>120</sup> Employers, as mentioned earlier, have taken advantage of this provision, but not, apparently, for the stated reason that work connection

113. See, e.g., *Southern Cal. Edison Co. v. Industrial Acc. Comm'n*, 238 Cal. App. 2d 567, 48 Cal. Rptr. 46 (1965).

114. LABOR STATISTICS, *supra* note 16.

115. CAL. LABOR CODE § 5706.

116. *Id.* § 5707; see, e.g., *Ottoson v. Union Lumber Co.*, 20 Cal. Comp. Cases 96 (1955).

117. CAL. LABOR CODE § 4050.

118. *Id.* § 4053; see, e.g., *Fibreboard Paper Prod. Corp. v. Industrial Acc. Comm'n*, 31 Cal. Comp. Cases 66 (1966).

119. CAL. LABOR CODE § 5000; see, e.g., *Carmichael v. Industrial Acc. Comm'n*, 234 Cal. App. 2d 311, 44 Cal. Rptr. 470 (1965).

120. CAL. LABOR CODE § 5001.

was almost impossible to disprove.<sup>121</sup> The basic motivation for seeking a compromise appears to lie elsewhere:

Compensation settlements, unlike damage suit settlements, seldom run into large figures, since there is no incentive for compromise by the employer or insurer unless the sum to be paid falls within the limits of compensation liability prescribed by statute.<sup>122</sup>

Thus, it would seem that the vast majority of compromises are entered into to avoid a probable award of maximum benefits.<sup>123</sup>

### Conclusion

To reiterate, neither the statistics, the decisions, nor the current statutory provisions evidence the need for arbitrary legal or medical standards. Given the medical uncertainties in the area of heart disease, California's approach to compensation therefor has not been demonstrably unfair. The present legal framework is well-suited for the assimilation and application of new medical knowledge concerning the relationship between employment and cardiac conditions. This is not to say that there is no room for improvement, but only that the imposition of arbitrary absolutes would be no improvement.

Admittedly, there have been instances where claims have been compensated even though there was no manifestation of any strain, usual or unusual, beyond that encountered in all normal activities.<sup>124</sup> Such cases, though, have been rare.<sup>125</sup> The adoption of arbitrary standards would, of course, rule out compensation in those circumstances. At the same time, however, compensation would be denied for a much greater number of meritorious claims.

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121. See text accompanying notes 14-16 *supra*.

122. 1 HANNA, *supra* note 20, § 8.02(4)(a).

123. California's "second injury law," *viz.*, CAL. LABOR CODE §§ 4750-55, could potentially operate to limit an employer's liability also, although to date it has had little application to heart cases. In order to obtain compensation under CAL. LABOR CODE § 4751, the employee must show that prior to the occurrence of the subsequent industrial injury, he had obtained the "factual status" of being "permanently partially disabled." *Ferguson v. Industrial Acc. Comm'n*, 50 Cal. 2d 469, 479, 326 P.2d 145, 150 (1958). Inasmuch as preexisting disease of the heart is often asymptomatic, and in most cases nondisabling, a claimant seldom qualifies for subsequent injury funds.

124. CORTEN & ST. CLAIR, *supra* note 92, at 17.

125. *Id.*

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